

Education, Public Law and the Individual, Volume 17, Issue 1, 2014, p. 20 - 28**SCHOOL EXCLUSION AND ENGLISH LEGAL REMEDIES:****A FAILURE TO PROTECT CHILDREN****Richard Harris**, Peripatetic Official, NASUWT**Carl Parsons**, Visiting Professor of Social Inclusion Studies, University of Greenwich

We argue in this paper that the law and administrative guidance on exclusion from school, as exercised in England, has always been poor. With the Independent Appeals Panel (IAP) now replaced by the Independent Review Panel (IRP) with a more circumscribed remit, protection for some of our most vulnerable and troubled children has weakened. The law is cumbersome in matters of child welfare and misleads parents into thinking redress is likely through reviews and appeals at the Governors Disciplinary Committee (GDC) level, within three weeks, the Appeal and now Review process, another three weeks, or beyond.

In 2011/12, there were 5,170 permanent exclusions from schools in England. Ten per cent were appealed. Approximately 25% of the appeals were successful. In only one third of successful appeals was reinstatement directed. Forty children returned to the excluding school¹. This is a very low ‘hit rate’, involves considerable cost and delay, and the whole adversarial process diverts attention and effort from a more conciliatory process of ensuring the continued education of the child. The current guidance runs to 30 pages² compared with the 80 pages and many documents on improving behaviour that were in place until 2011.³

We first set out the tortuous, combative system in place now and then demonstrate that it diverts attention from the speedy provision of appropriate care and education to meet the needs and rights of the child.

On the 1st September 2012, the system available to children to seek redress against a decision to exclude them from school radically changed. Appeals to an IAP against a governing body’s decision to uphold an exclusion are no longer possible. There is now an administrative law style IRP whose hearings are conducted in accordance with statutory guidance⁴ and the guiding Statutory Instrument.⁵ The heart of these documents is that the IRP accepts that Parliament has given the Headteacher, not the

¹ DfE 2012 Permanent and fixed period exclusions from schools in England: 2011 to 2012 academic year. SFR29-2013_v2-4, table 13

² Department for Education (2012) *Exclusion from maintained schools, Academies and pupil referral units in England: A guide for those with legal responsibilities in relation to exclusion*, London: DfE.

³ Department for Children, Schools and Families (2008) *Improving behaviour and attendance: guidance on exclusion from schools and Pupil Referral Units*, London: DCSF.

⁴ *Exclusion from maintained schools, Academies and pupil referral units in England: A guide for those with legal responsibilities in relation to exclusion*, Department of Education 2012.

⁵ The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI 2012 No. 1033.

IRP, the power to decide whether or not to exclude.⁶ [1] The IRP knows that it is not their job to retake the Headteacher's decision. The IRP has the single task of checking that the Headteacher's decision to exclude, and the governing body's acceptance of that decision, was taken lawfully. In short, a review is not concerned with the merits of the decision to exclude, but with how the decision was reached. If the Headteacher's and governing body's decisions are lawful, the decision takers will have followed the rules and avoided acting irrationally or unlawfully, or avoided following an improper procedure; for example, a Headteacher deciding to exclude a child principally because of his belief in scientology would be acting unlawfully.[2]

The process a child and family are now required to follow to challenge an exclusion looks superficially like the pre-1st September 2012 appeal to an IAP. It is not. It is difficult to see the benefit a child would gain by following the complex processes set out in the statutory guidance.⁷ Unlike its predecessor, the IRP does not have the power to order reinstatement. There are only three decisions available to the IRP, to:

- a) uphold the exclusion decision;
- b) recommend that the governing body reconsiders their decision, or
- c) quash the decision and direct that the governing body considers the exclusion again.

It is outcome (c) that is the administrative law style decision. For outcome (c) the IRP needs to find that the school's decision to exclude was not lawfully taken because of illegality, unreasonableness or procedural impropriety. The IRP say, in effect, 'please, decision takers, Headteacher (and governing body), start again. Go afresh through the process of considering whether or not the child should be excluded.'

If the IRP decide on outcome (c), the IRP must be careful only to consider evidence that was or could have been put to the governing body at the time it ratified the Headteacher's decision to exclude. This rule keeps the IRP properly within the bounds of conducting a review rather than an appeal. Where the IRP wishes to find in favour of the child because of *new evidence* that would not have been available to the governing body at the time it ratified the Headteacher's decision to exclude, the IRP cannot decide upon outcome (c). The IRP can simply recommend that the governing body or school proprietor reconsider the decision to exclude.

The IRP can make this 'could you look at this again?' recommendation in any case. The outcomes (a) and (b) are always available to an IRP at the end of a review hearing. It is important to note that it is

⁶ The relevant administrative law principle is set out in *R v Chief Constable of North Wales, ex p. Evans* [1982] WLR 1155 per Lord Brightman at 1173 F.

⁷ See footnote 2 above - *Exclusion from maintained schools*.

Local Authorities or Academy Trusts which are responsible for arranging IRP hearings.⁸

The question Surrey County Council rightly puts on its website is, “*Is there any point in applying for a Review?*” Surrey is unable to suggest that yes is the answer to its own question. It lamely advises parents that, “*It is for you to decide but you should understand that the role of the Independent Review Panel is to review the decision of the Governing Body to exclude your child. It cannot reinstate your child*”.⁹

A child cannot even ensure that, given outcome (c) in their favour, that the school will freshly consider the exclusion. The 2012 Regulations Part 2 state at 7(5)(b) that an IRP:

“may... order that the local authority are to make an adjustment to the school’s budget share for the funding period during which the exclusion occurs in the sum of £4,000 if, following a decision by the panel to quash the governing body’s original decision, the governing body—

(i) reconsider the exclusion and decide not to reinstate the child; or

(ii) fail to reconsider the exclusion within the time limit specified . . .”

That is, providing the IRP order that the school suffer a £4000 penalty if it fails to reinstate the child, the governing body can simply do nothing and it will face no further penalty.

Why would any child use this process to seek a review of exclusion? There are three principal reasons.

The first is that the purpose of the review process is to ask the school to reconsider the exclusion. As soon as the child triggers the review process, the school is naturally engaged in reconsidering its decision to exclude (although in an informal way, the school’s formal processes having been completed). It is open to the Headteacher at any time to withdraw an exclusion that has not been considered by the governing body, or else the decision to withdraw the exclusion is a decision the governing body must make.

The second is in cases where the child and family are considering making a claim in the Health, Education and Social Care Chamber of the First-tier Tribunal or to the County Court, claiming that the exclusion was an act of discrimination^[3]. The advantage of running the discrimination argument before an IRP¹⁰ is that due to the relative informality of the proceedings the evidence put before the IRP by the Headteacher and the governing body is almost certainly going to be less well prepared, and

⁸ *Exclusion from maintained schools* - paragraph 83.

⁹ [http://www.surreycc.gov.uk/learning/schools/parents-school-advice-and-support/attendance-truancy-and-exclusion/exclusion-from-school/review-against-exclusion/should-i-appeal-to-the-independent-review-panel#What powers does the Independent Review Panel have?](http://www.surreycc.gov.uk/learning/schools/parents-school-advice-and-support/attendance-truancy-and-exclusion/exclusion-from-school/review-against-exclusion/should-i-appeal-to-the-independent-review-panel#What%20powers%20does%20the%20Independent%20Review%20Panel%20have?)

¹⁰ *Exclusion from maintained schools* - paragraph 137

easier to challenge, than the evidence they will present to the Tribunal or Court. They may well make admissions, or put their case to the IRP in rather less precise language than they would want to use in the witness statements prepared for the First-tier Tribunal or County Court. Such differences might be useful later. In some cases the child and family might decide that the school had put its case so compellingly to the IRP that further proceedings should not be pursued. In cases of disability discrimination where the disability is the child's emotional or behavioural disorder, it is also an opportunity to test the school's response to the suggestion that the school had acted irrationally as it had failed to take account of current research and best practice on the management of children with and emotional or behavioural disorders.¹¹ If an SEN expert is present at the child or family's request, they might be helpfully pressed for their view on this.¹²

The third concerns testing whether or not the decision to exclude was truly proportionate. There are two aspects to this idea: the public sector equality duty,¹³ and a proportionality duty that has its roots in the European Convention on Human Rights. For these purposes, this duty is set out clearly in the statutory guidance.¹⁴ The public sector equality duty includes the duty to ensure that the school's practice and policy concerning exclusion does not increase the risk for some categories of children to be dealt with in a way that increases their risk of exclusion.¹⁵ It may in reality be rare for a

¹¹ For example - *Supporting pupils with emotional and behavioural difficulties (EBD) in mainstream primary schools:*

a systematic review of recent research on strategy effectiveness (1999 to 2002)

EPPI Centre: 2003 - <http://eppi.ioe.ac.uk/cms/LinkClick.aspx?fileticket=hS19KqqVY5s%3D>

and *Supporting children with challenging behaviour through a nurture group approach*,

Ofsted: 2011.

¹² *Exclusion from maintained schools* - paragraph 136: "Where present, the panel must seek and have regard to the SEN expert's view of how SEN might be relevant to the pupil's exclusion."

¹³ *Exclusion from maintained schools* - paragraph 9: "In carrying out their functions under the Equality Act, the public sector equality duty means schools must also have due regard to the need to:

- eliminate discrimination and other conduct that is prohibited by the Equality Act;
- advance equality of opportunity between people who share a protected characteristic and people who do not share it; and
- foster good relations across all characteristics – between people who share a protected characteristic and people who do not share it."

¹⁴ *Exclusion from maintained schools* - paragraph 15: "A decision to exclude a pupil permanently should only be taken:

- in response to a serious breach, or persistent breaches, of the school's behaviour policy; and
- where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school."

¹⁵ *Exclusion from maintained schools* – paragraph 20: "The exclusion rates for certain groups of pupils are consistently higher than average. This includes: pupils with SEN; pupils eligible for Free School Meals; looked after children; and pupils from certain ethnic groups. The ethnic groups with the highest rates of exclusion are: Gypsy / Roma; Travellers of Irish Heritage; and Black Caribbean communities."

Exclusion from maintained schools – paragraph 21: "In addition to the approaches on early intervention set out above, head teachers should consider what extra support might be needed to identify and address the needs of pupils from these groups in order to reduce their risk of exclusion. For example, schools might draw on the support of Traveller Education Services, or other professionals, to help build trust when engaging with families from Traveller communities."

Exclusion from maintained schools – paragraph 22: As well as having disproportionately high rates of exclusion, there are certain groups of pupils with additional needs who are particularly vulnerable to the impacts of exclusion. This includes pupils with statements of special educational needs (SEN) and looked after children. Head teachers should, as far as possible, avoid excluding

Headteacher to purposively focus his / her mind on all these issues whilst considering whether or not to exclude. Appropriately targeted questioning of the Headteacher about these matters at the hearing before the governing body or at the hearing before the IRP may well tease out crucial evidence that the Headteacher's decision to exclude was procedurally improper or unlawful.

For the proportionality duty, it is hard to envisage that many Headteachers would have seriously considered the issue of whether allowing the child to remain in school might *seriously* harm the education or welfare of the child or others in the school (my emphasis). It is suggested that even a serious one-off incident that triggered the exclusion is unlikely to show that allowing the child to remain in school would *seriously* harm the education or welfare of the child or others in the school, particularly as the school should have considered and implemented best practice in the management of children with behavioural difficulties^[4]. Where the exclusion is based on a series of incidents, it might be more difficult for the Headteacher to explain why the Headteacher decided to exclude when many schools successfully operate a no exclusion policy, and, more compelling, to suggest that any rational and reasonable Headteacher would have avoided exclusion by following best practice.¹⁶ Appropriate questioning at the governor hearing and at the IRP may well show that the Headteacher did not consider these issues, evidence that might be essential for pursuing a successful claim to the First-tier Tribunal or the County Court.

Optimistically, we can argue that we have reached a position where permanent exclusion, and possibly fixed period exclusion, are redundant. Good practice in relation to inclusion for assessed special educational needs and disabilities or for discipline would mean that a school or the community of education providers have in place appropriate provision for *all* children. They would also have professionals or agents who can mediate and ease any transition, advising parents and schools about options and agreeing the child's placement. In *Strategic Alternatives to Exclusion from School*¹⁷ evidence is given of how schools in a local area can collectively design their provision so that all children are catered for. This involves 'broadening the school' by setting up units and centres within the school for those who are deemed to struggle in the mainstream classroom; 'building the bridges' so that managed moves can be organised to another school or location for education; and 'alternative provision' to which children might be referred for a mix of educational experience better suited to their attributes. All of this needs to be of suitable quality and there are enough examples of this done well to stand out as feasible examples of inclusion practice which put a child's well-being at the centre.

Community Based Inclusion,¹⁸ as it is called, is about the design and management of aggregate educational provision in an area such that there is recognition of the full range of needs and

permanently any pupil with a statement of SEN or a looked after child.

¹⁶ *Exclusion from maintained schools* – paragraph 5: "Any decision of a school, including exclusion, must be made in line with the principles of administrative law, i.e. that it is: lawful (with respect to the legislation relating directly to exclusions and a school's wider legal duties, including the European Convention of Human Rights); rational; reasonable; fair; and proportionate."

¹⁷ Parsons, C. Trentham Press, 2011.

¹⁸ <http://www.inaura.net/research/what-community-based-inclusion>

commitment and practical action to meet these needs. As the education system fragments with local authority schools reducing in number and academies and free schools on the increase, organising across an area becomes more difficult though it is still encouraged and is evident even amongst groupings that included LA schools and academies.¹⁹

Schools are the big players with some secondary school heads earning over £100,000 and with budgets of £10 million. They have the resources to spend flexibly and allocate disproportionately to meet needs, including where there is a perceived challenge to school discipline with no diagnosed special need.

The DfE pilot for the new exclusion arrangements²⁰ places the funding for school exclusions in the school and gives Headteachers the responsibility for providing the education. Eleven areas are piloting these arrangements and LAs such as Staffordshire and Cambridgeshire and the Ashford (Kent) zero exclusion area have functioned in this way for some years. This requires also the effective operation of Fair Access Panels (FAP) such as in Portsmouth and Waltham Forest, which operate swiftly to organise where a child is to be educated if a move is deemed optimal.

This does presume that the mediating professionals, those who go out and accompany and support parents and counsel young people, are available to facilitate these processes.

The results of the pilot will be published in the Autumn of 2014 and LAs may well relinquish (or have removed from them) the responsibility for excluded children. Working at its best, there will be no need for and no point to exclusion.

Safeguarding legislation and the Children Act are benevolent legal entities putting children's welfare at the centre. Exclusion law, as operated in England even more than in other parts of the UK, hardly mentions the child's welfare²¹, children's rights to education²² and the prevention of harm.²³[5] The pseudo legal GDCs[6] and IRPs are largely about - did the child do what was alleged and was the punishment not irrational rather than about what does this child need and what do we, as the education

¹⁹ Parsons, C. (2011) 'Collaborating to avoid exclusion', *Academies Update*, summer 2011, 36:37 London, Specialist Schools and Academies Trust

²⁰ Abdelnoor, A. (2007) <http://www.gulbenkian.org.uk/pdf/files/--item-1229-216-Managed-moves-04-08.pdf>

²¹ despite the Children Act 1989 s1:

(1) When a court determines any question with respect to—
(a) the upbringing of a child; or
(b) . . . it,
the child's welfare shall be the court's paramount consideration.

²² cf section 175 Of the Education Act 2002

²³ The UN Convention on the rights of the child at 3(1) states "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Further, Baroness Hale in *ZH (Tanzania) v Secretary of State for the Home Department* (2011) 2 All ER 783 at 795 a-c said "This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law". This dictum was recently cited with approval by Moses LJ in *R v Secretary of State for the Home Department ex parte HC* [2013] EWHC 982.

and care providers, do to provide the quality learning experience that this child needs.

The challenge faced is this: if the legal type challenges at the GDP and IRP, where sometimes barristers are present for one or both sides, are now even more spurious than in the period before September 2012, when IAPs operated, and if the focus on the child's welfare is in the background while the adversarial blustering goes on, then where is the value of legal involvement? [7]

We would argue for three reasons that the valuable impact that the legal profession can make is at the higher levels on First-tier Tribunal (FTT) and County Court and at Judicial Review in the High Court. The reasons: firstly, the remedy available at the IRP is derisory and they cannot reverse the effect of the exclusion decision; secondly, the expense at this level for both sides involved in the legal dispute (and it is *legal* at this level) are such that a local authority, an LA school or an academy would not want to be engaged in this process more than once - it is estimated that mounting a defence of an exclusion decision at a FTT would cost an estimated £12,000 [8]; thirdly, this deterrent of higher level action would feedback strongly to encourage groups of schools to manage their provision such that they can accommodate challenging children and recognise that the allocation of different levels of funding to ensure the welfare children with particular needs should be commonplace.

RICHARD HARRIS

Peripatetic Official, NASUWT

CARL PARSONS

Visiting Professor of Social Inclusion Studies, University of Greenwich